

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

MALIK OMAR DURHAM,

Petitioner,

v.

**LOUIS E. BRUCE, Warden Hutchinson
Correctional Facility,**

and

**PHIL KLINE, Attorney General
of Kansas,**

Respondents.

CIVIL ACTION

No. 03-3205-CM

MEMORANDUM AND ORDER

In 1996, plaintiff was convicted in the District Court of Wyandotte County, Kansas, of aggravated robbery and sentenced to 190 months' imprisonment. Petitioner's sentence was enhanced based upon two prior juvenile convictions, to which petitioner had pled guilty. Petitioner claims that his guilty pleas in those juvenile adjudications were unconstitutionally obtained and that, as a result, his current sentence also is unconstitutional. This matter is before the court on petitioner's Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1).

I. Standard of Review

Petitioner's application for habeas relief is governed by the habeas statute as amended by the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254. *Williams v.*

Taylor, 529 U.S. 362, 402 (2000). The Act “places a new constraint on the power of a federal habeas court to grant a state prisoner’s application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court.” *Id.* at 412. Under the amended version of 28 U.S.C. § 2254(d)(1), a petitioner is entitled to federal habeas relief only if he can establish that the state court decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States” or “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d)(1), (2). Under § 2254(d)(1), a federal court may grant a writ of habeas corpus only if the state court reached a conclusion opposite to that reached by the Supreme Court on a question of law, decided the case differently than the Supreme Court has decided a case with a materially indistinguishable set of facts, or unreasonably applied the governing legal principle to the facts of the petitioner’s case. *See Williams*, 529 U.S. at 412-13.

II. Facts

When petitioner was a juvenile, he entered a plea of guilty to theft, a class E felony, and burglary, a class D felony. In a later juvenile case, petitioner entered a plea of guilty to burglary, a severity level 7, person felony. In both cases, petitioner had appointed counsel, and his probation ended on December 20, 1995.

Petitioner is currently serving his sentence for aggravated robbery, a severity level 3, person felony. At sentencing, the presentence investigation (PSI) report included the three juvenile adjudications. The PSI report computed petitioner’s criminal history score as “B,” making his

sentencing range 172-180-190 months' imprisonment. Over petitioner's objections, the trial court found his criminal history score was "B" and sentenced him to 190 months' imprisonment.

In his direct appeal, petitioner challenged the inclusion of his prior juvenile adjudications in his criminal history as an ex post facto violation and a denial of due process. Citing *State v. LaMunyon*, 259 Kan. 54, 911 P.2d 151 (1996), the Court rejected his arguments.

Later, petitioner sought post-conviction relief pursuant to Kan. Stat. Ann. § 60-1507. In that proceeding, petitioner again maintained that the inclusion of his previous juvenile adjudications in his criminal history was an ex post facto violation. In the same § 60-1507 proceeding, petitioner filed a second motion, which attacked the adjudications in his two juvenile cases. He contended the complaint for the 1991 burglary offense was defective because it failed to state all the elements of the offense and failed to charge a severity level 7, person felony. Petitioner also claimed his confession was coerced.

The trial court conducted a hearing with both petitioner and his appointed counsel present. By agreement, petitioner raised an additional argument that his juvenile adjudications were invalid because the juvenile court did not comply with Kan. Stat. Ann. § 38-1633 when he entered his guilty plea in juvenile court.

The trial court denied relief on all of petitioner's arguments. The court found that petitioner was no longer under a sentence or disposition in the juvenile cases. Thus, the court concluded petitioner could not collaterally attack his juvenile adjudications with a § 60-1507 motion and that petitioner's arguments regarding the reclassification of the offenses in his juvenile cases to calculate his criminal history score were controlled by *LaMunyon*.

The trial court's denial of post-conviction relief was affirmed by the Kansas Court of Appeals. The Kansas Supreme Court subsequently denied review.

III. Discussion

Plaintiff argues that his juvenile adjudications did not comply with due process. Apparently, Cline I. Boone, Assistant District Attorney for the Twenty-Nine Judicial District of Kansas, agreed, asserting in the state's brief to the Kansas Court of Appeals that the district court in petitioner's juvenile adjudications failed to make proper findings of fact as to whether the stipulations were constitutionally or statutorily sufficient. (Brief of Appellee, at 3-4).

Notwithstanding the state's admission that petitioner's juvenile convictions were constitutionally deficient, this case is clearly controlled by the Supreme Court's holding in *Lackawanna County District Attorney v. Coss*, 532 U.S. 394 (2001). In *Lackawanna*, the Court held that, once a state conviction is no longer open to direct or collateral attack in its own right because the defendant either failed to pursue those remedies while they were available or pursued those remedies unsuccessfully, the conviction may be regarded as conclusively valid. *Id.* at 403 (citing *Daniels v. United States*, 532 U.S. 374 (2001)). The Court based its decision on the need for finality of convictions and the ease of administration of challenges to expired state convictions. "If that conviction is later used to enhance a criminal sentence, the defendant generally may not challenge the enhanced sentence through a petition under § 2254 on the ground that the prior conviction was unconstitutionally obtained." *Id.* The court recognized only one exception to the general rule for § 2254 petitions that challenge an enhanced sentence on the basis

that the prior conviction used to enhance the sentence was unconstitutionally obtained: where there was a failure to appoint counsel in violation of the Sixth Amendment.

Here, petitioner's present sentence was enhanced based upon two juvenile adjudications which, petitioner contends, were unconstitutional. However, those juvenile adjudications are no longer open to direct or collateral attack. Thus, the facts of this case fall squarely within the purview of *Lackawanna*. Moreover, petitioner had appointed counsel throughout his juvenile proceedings. As such, petitioner's circumstances do not fall within the exception set forth in *Lackawanna*. Petitioner's habeas corpus petition is precluded by *Lackawanna*. Accordingly, the decision of the Kansas Court of Appeals did not violate clearly established precedent of the United States Supreme Court and, thus, petitioner's argument must fail.

IT IS THEREFORE ORDERED that petitioner's Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1) is denied.

Dated this 24 day of May 2004, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge

